HRC Shipping Sdn Bhd v Ketua Pengarah Jabatan Laut, Pelabuhan Klang & Ors

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW NO 25–10–03 OF 2016
MOHD YAZID J
19 OCTOBER 2016

Civil Procedure — Judicial review — Application for — Respondents issued statement of quotations to appellant due to violations committed by appellant — Appellant sought certiorari and stay of execution — Whether application for judicial review filed within time frame prescribed under O 53 r 3(6) of the Rules of Court 2012 — Whether appellant could apply for stay of execution in present case — Rules of Court 2012 O 53 r 3(6)

The respondents had issued a statement of quotations ('the decisions') on 8 April 2015 pursuant to s 381(1) of the Merchant Shipping Ordinance 1952 to the applicants due to violations committed by applicant's vessels known as MV Banga Bodor and MV Banga Biraj ('vessels'). The vessels were initially left stranded at Port Klang and were considered a wreck. By a letter dated 8 April 2014, the applicant was asked to remove the said wreck but they failed to do so, hence the decisions. In the present case, the applicant vide encl 1 applied for judicial review of the said decisions and sought, inter alia, certiorari order and stay of execution pending the present case. The present application was filed on 24 March 2016.

Held, dismissing encl 1:

(1) The requirement to file the judicial review application within the time frame prescribed is an essential requirement. The judicial review application which was filed on 24 March 2016 had exceeded the prescribed time for filing ie three months pursuant to O 53 r 3(6) of the Rules of Court 2012 ('the ROC'). There was a delay of nearly eight months counting from the date of statement of quotations issued on 8 April 2015 and nearly two years from the date of the notice issued on 8 April 2014. The applicant had also failed to provide good reasons for their delay and no application was filed for extension of time pursuant to O 35 r 3(7) of the ROC. The non-compliance with the time frame for filing the judicial review was fatal (see paras 4(b)–(f), (i) & (l)).

(2) The applicant ought to firstly obtain an order for extension of time followed by leave to file the judicial review application. They ought to have filed the stay of execution only upon obtaining the leave to file the judicial review application (see para 5).

[Bahasa Malaysia summary

Responden-responden telah mengeluarkan kenyataan sebut harga-sebut harga ('keputusan tersebut') pada 8 April 2015 berikutan kepada s 381(1) Ordinan Perkapalan Saudagar 1952 kepada pemohon-pemohon akibat kepada pencabulan yang dilakukan oleh kapal-kapal pemohon-pemohon yang dikenali sebagai MV Banga Bodor dan MV Banga Biraj ('kapal-kapal tersebut'). Kapal-kapal tersebut pada mulanya dibiarkan terbengkalai di Pelabuhan Kelang dan dianggap bangkai kapal. Melalui surat bertarikh 8 April 2014, pemohon disuruh untuk memindahkan bangkai kapal tersebut tetapi mereka gagal berbuat sedemikian, maka keputusan-keputusan tersebut. Dalam kes ini, pemohon melalui lampiran 1 memohon untuk semakan kehakiman terhadap keputusan-keputusan tersebut dan memohon, antara lain, perintah certiorari dan penangguhan pelaksanaan sementara menunggu kes ini didengar. Permohonan ini difailkan pada 24 Mac 2016.

Diputuskan, menolak lampiran 1:

(1) Keperluan untuk memfailkan permohonan semakan kehakiman dalam rangka masa yang ditetapkan adalah keperluan penting. Permohonan semakan kehakiman yang mana difailkan pada 24 Mac 2016 telah melebihi masa yang ditetapkan bagi pemfailan iaitu tiga bulan berikutan kepada A 53 k 3(6) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Terdapat kelewatan hampir lapan bulan dikira dari tarikh kenyataan sebut harga-sebut harga dikeluarkan pada 8 April 2015 dan hampir dua tahun dari tarikh notis dikeluarkan pada 8 April 2014. Pemohon juga gagal untuk memberikan alasan baik bagi kelewatan mereka dan permohonan tidak difailkan bagi pelanjutan masa berikutan A 35 k 3(7) KKM. Ketidakpatuhan dengan rangka masa bagi pemfailan semakan kehakiman tersebut adalah padah (lihat perenggan 4(b)–(f), (i) & (l)).

(2) Pemohon patut mula-mulanya memperolehi perintah untuk pelanjutan masa diikuti izin untuk memfailkan permohonan semakan kehakiman. Mereka patut memfailkan penangguhan pelaksanaan hanya selepas memperolehi izin untuk memfailkan permohonan semakan kehakiman (lihat perenggan 5).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5575–5579.

Cases referred to

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54, FC (refd)
Seruan Gemilang Makmur Sdn Bhd v Pegawai Kewangan Negeri Pahang [2016] 2 MLJ 225, CA (refd)
Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161, FC (refd)
Yahya bin Kassim v Government of Malaysia & Anor [1997] 3 MLJ 749; [1998] 1 CLJ 43, CA (refd)

Legislation referred to

Merchant Shipping Ordinance 1952 s 381(1), (3)(c)
Rules of Court 2012 O 53 rr 3(2), (6), (7)
Rules of the High Court 1980

Raippen (The Law Office of Raippan) for the appellant.
Haryati Ahmad (Federal Counsel, Attorney General's Chambers) for the respondent.

Mohd Yazid J:

[1] The plaintiff vide encl 1 filed an application for judicial review seeking for the following reliefs:

(i) Bahawa kebenaran diberi kepada Pemohon yang tersebut di atas bagi Pemohon suatu Perintah Certiorari untuk dikemukakan ke Mahkamah Yang Mulia ini yang bertujuan untuk mengenepikan atau membatalkan suatu keputusan Kenyataan Sebut Harga No. JLWT 8 & 9/2015 yang bertarikh 08.04.2015;

(ii) Bahawa semua prosiding-prosiding lanjutan atau permohonan berhubungan dengan keputusan Kenyataan Sebut Harga No JLWT 8 & 9/2015 yang bertarikh 08.04.2015 untuk pelaksanaan atau penguatkuasaan keputusan tersebut digantung sehingga perkara ini ditentukan oleh Mahkamah yang Mulia ini;

(iii) Bahawa Pemohon diberi masa lanjut semalam 6 minggu dari tarikh perintah diberikan oleh Mahkamah supaya kedua-dua kapal M.V. Boodor dan M.V. Banga Biraj di tunda dari perairan Malaysia ke Dhaka.

(iv) Bahawa kos permohonan dan tindakan ini ditanggung oleh Responden dalam sebarang keadaan; dan

(v) Perintah selain dan selanjutnya yang Mahkamah Yang Mulia ini fikirkan adil dan suaimanfaat.

[2] The salient facts as submitted by the federal counsel are not in disputed and are as follows:

(a) the applicants are the owner of both vessels MV Banga Bodor and MV Banga Biraj;

(b) the respondents issued out the statement of quotations (*kenyataan sebut harga*) No JLWT 8 and 9/2015 as a follow-up action taken under s 381(1) of the Merchant Shipping Ordinance 1952 (see exhs 'A1 and 2');

(c) actions and decisions taken against the applicant in respect of vessels MV Banga Bodor and MV Banga Biraj ('vessels') is a follow-up of violations committed by these vessels, which began when the vessels were left stranded at Port Klang Deep Water Point Anchorage (North) water without permission. It was considered a wreck and the Applicant was asked to take immediate action on the matter by letter dated 8 April 2014, but the applicant has failed to act to remove the said wreck which has become a public nuisance, caused inconvenience and likely to cause harmful consequences to the marine environment;

(d) on the same letter the applicant had been informed by the receiver of wreck that if they fail to comply with the direction to remove the said wreck, the said wreck and property recovered therein will be disposed pursuant to s 318(3)(c) of the Merchant Shipping ordinance (see exh D of the applicant affidavit in support);

(e) from exh C of the applicant affidavit in support it is shown that this is not the first notice given by the respondents. The respondents had issued notices to the applicant since 2012 to remove MV Banga Bodor and MV Banga Biraj. The agent on several occasions had made promise to tow both vessels out from the Malaysia territory but they had failed to do so;

(f) the Marine Department of Malaysia has given plenty of time and opportunity to the applicant through negotiations that have been made to overcome the problems faced by these vessels but from the date notice under s 381(1) of the Merchant Shipping Ordinance 1952 were issued on 8 April 2014 the applicant had failed to take any action to remove the vessels in the given time period ie 14 days; and

(g) the decision to issue the notice above and the following actions after that until the statements of quotations No JLWT 8 and 9/2015 were issued is made in accordance of the provisions under the Merchant Shipping Ordinance 1952, which is an act the respondent as a public authority under the law.

[3] The following are the documents filed in relation to the applicant's application before the court:

(a) notice of application dated 24 March 2016;

(b) applications affidavit in support affirmed by Aida bt Tarikat on 22 February 2016;

(c) statement by O 53 r 3(2) of the Rules of Court 2012 on 18 March 2016; A

(d) applicant written submission dated 5 May 2016; and

(e) AG preliminary objection on points of law dated 6 May 2016.

[4] I dismissed encl 1 based on the following grounds: B

(a) by a letter dated 8 April 2014, the first respondent notified the applicants to remove the wrecks and if the applicants fail to comply with the direction, the said wrecks and properties therein, will be disposed C pursuant to s 381(3)(c) of the Merchant Shipping Ordinance. Subsequently, on 8 April 2014 the first respondent issued the statement of quotation (*kenyataan sebut harga*) No JLWT 8 and 9/2015. The statement of quotation is a follow-up actions taken to dispose the wrecks in pursuant to s 381(3)(c) of the Merchant Shipping Ordinance; D

(b) the judicial review application was filed on 24 March 2006 had exceeded the prescribed time for filing, a delay of nearly eight months counting from the date of statement of quotations issued on 8 April 2015 and E nearly two years from the date of the notice issued on 8 April 2014;

(c) therefore the judicial review application was filed out of time and in contravention of O 53 r 3(6) which provides as follows: F

> (6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

(d) it has been emphasised again and again by the court that the requirement G to file the judicial review application within the time frame prescribed is an essential requirement. This was held by the Federal Court in the case of *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54, whereby a delay of a mere four days to file the judicial review application for leave rendered the court with no H jurisdiction to hear the matter;

(e) I find non-compliance with the time frame for filing the judicial review was fatal. In support of this, the Court of Appeal case of *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749; [1998] 1 CLJ 43 I wherein it was held that a failure to file judicial review application within the stipulated time is usually fatal as follow:

> ... At this juncture we wish to draw the attention of all concerned to.

> Applications for certiorari must be made within six weeks of the decision which is impugned. Leave is required before the substantive application is filed. The failure to apply within the time limit is usually fatal. There are powerful reasons why these provisions have been enacted ...

(f) I would like to emphasise that the cases above were in fact based on the previous Rules of the High Court 1980 which provided for a shorter time period to file the application. In comparison to the Rules of Court 2012, which in fact provides for a longer time frame ie three months to file the judicial review application, it could be seen that even applying the new Rules of Court 2012, the applicant fails to come within the prescribed time frame to lodge this application for judicial review;

(g) in the case of *Seruan Gemilang Makmur Sdn Bhd v Pegawai Kewangan Negeri Pahang* [2016] 2 MLJ 225:

> [35] In our view, the prima facie rule is that an application to apply for leave for judicial review made outside the prescribed period will not be entertained and it is a pre-condition to the exercise of discretion in his or her favour that the applicant show an a good reasons of the delay. The court would not grant the application for extension unless positively satisfied it is proper to do so. The judicial rulings indicate that what explanations for delay will be acceptable may vary according to the circumstances of each case.
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> [36] The settled law is that the operative time for the ground to have arisen, and which set the timeline within which the application is to be made, is the date when the first decision communicated to the applicant.

(h) in the case of *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161:

> ... The time frame in applying for judicial review prescribed by the Rules was fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not was irrelevant ...

(i) in applying the principle enunciated in the above cases, this court finds that the applicant had failed to provide good reasons for their delay in filling their application for judicial application. In fact a perusal of the said affidavit of Aida bt Tarikat affirmed on 22 February 2016, it is noted that the affidavit does not proffer any reasons for their delay;

(j) this court is minded of the Federal Court decision in the case of *Duli Yang*

Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, wherein His Lordship YA Zaki Tun Azmi CJ in delivering the judgment of the court stated at para 46 p 163 (MLJ); pp 345–346 (CLJ):

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons.

(k) this court is unable to adopt the principle in the above Federal Court to the present case on the basis that the applicant in the present case for reasons best known had failed to provide any reasons whatsoever for their delay in filling this judicial review application. On this note the court is based on the absence of good reasons, unable to use its discretion.

Order 35 r 3(7):

(l) the court further finds that having full knowledge that their judicial application is out of time, the applicant ought to have filed an application for an extension of time pursuant to O 53 r 3(7) of the Rules of Court 2012. No such application was filed by the applicant and this further justifies the courts stand on the issue of time period for filling the judicial review application; and

(m) there seems to be a current trend these days of parties seeking to file an application for an extension of time and subsequently followed by the leave application for filling the judicial review. This court is of the view that parties may seek an order for an extension of time and followed by the leave application for judicial review in one single application.

Stay of execution:

(n) the applicant vide this present judicial review application had also sought for an order for a stay of execution of the *keputusan sebut harga* (refer to prayer 2); and

(o) in the affidavit, the applicant further requests for a stay be granted for them to remove the wrecks (paras 17 and 18 of the affidavit of Aida bt Tarikat).

[5] This court is of the view that the applicant had instead jumped the gun. What the applicant ought to have done was to firstly obtain an order for an extension of time followed by leave to file the judicial review application. They ought to have filed the stay only upon obtaining the leave to file the judicial review application.

Enclosure 1 dismissed.

Reported by Dzulqarnain Ab Fatar